

**Mississippi Power & Light Company and International Brotherhood of Electrical Workers, Locals 605 and 985.** Case 15-UC-132

July 26, 1999

**DECISION ON REVIEW AND ORDER  
CLARIFYING UNIT**

BY CHAIRMAN TRUESDALE AND MEMBERS FOX,  
LIEBMAN, HURTGEN, AND BRAME

On September 30, 1993, the Regional Director for Region 15 issued a Decision and Order in the above-entitled proceeding in which he dismissed the Employer's unit clarification petition seeking to exclude, as supervisors, the Employer's distribution dispatchers and system dispatchers, from the bargaining unit represented by the Unions. In accord with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review, contending that the dispatchers at issue are statutory supervisors pursuant to established precedent set by the Board's decision in *Big Rivers Electric Corp.*, 266 NLRB 380 (1983). The Unions filed an opposing brief. By Order dated March 25, 1994, the Board granted the Employer's request for review.

The Board has considered the entire record in this case, including the parties' briefs on review, and has decided to overrule *Big Rivers*, and to find that the distribution dispatchers and the system dispatchers at issue are not statutory supervisors.

**I. FACTS**

**A. Background**

The material facts, as found by the Regional Director, are not disputed. The Employer generates, transmits, and distributes electrical power throughout the western half of the State of Mississippi. The Employer and the Unions have negotiated successive collective-bargaining agreements for more than 50 years, covering a unit that includes electrical employees engaged in operation, meter reading, maintenance, construction, storeroom, and production activities.<sup>1</sup>

The Employer's operations are organized into three divisions—Northern, Central, and Southern. The 19 dispatchers the Employer seeks to exclude from the bargaining unit all are employed in the Jackson district, one of five districts in the Central Division. Management of the Jackson district includes District Manager Wooten, Service Superintendent May, Manager of Operations/Communications Magee, and Service Supervisors Toole and Flowers.

The Employer employs two classifications of dispatchers. The distribution dispatchers monitor the status

of the local distribution system,<sup>2</sup> and the system dispatchers monitor the long-distance transmission system.<sup>3</sup> All dispatchers coordinate the removal of equipment or line sections from service, either for routine maintenance or in emergencies. This is done by switching, i.e., the sequential opening and closing of specific switches on power lines to divert electric current around a section of line that has been scheduled for routine maintenance, a section that has been damaged, or a section which is down. In some instances dispatchers may accomplish the switching operations remotely through a computer system called the supervisory control and data acquisition system (SCADA system). In other instances, however, the dispatchers must rely on field employees, either servicemen or troublemen, to carry out the switching operations manually.

**B. Distribution Dispatchers**

Distribution dispatchers are responsible for monitoring the status of the distribution system to restore power after an outage; directing field employees in repairing faults and performing switching procedures; and completing associated paperwork. They also are responsible for overseeing all elements of the electric distribution system from substations to customers' premises. During business hours, the distribution dispatchers are responsible solely for the Jackson district (approximately 90,000 customers and 23 substations). After business hours, however, they are responsible for all five districts of the Central Division and one district in the Southern Division (adding 90,000 customers and 40 substations). In addition to monitoring the daily distribution of electricity, the distribution dispatchers set priorities for work requests and orders, coordinate the response of troubleshooting personnel, monitor building security after hours, and decide whether to call out meter readers or servicemen for any after-hour reconnection of customers who have been disconnected (for not paying their bills or in error).

The dispatch room operates 24 hours a day, 7 days a week. Either Dispatcher Supervisor Toole or the service supervisors (who supervise the dispatchers when Toole is not at work) are on duty Monday through Friday from 7 a.m. to 9 p.m. There are no supervisors from 11 p.m. to 7 a.m. on weekdays, and the Employer plans to end weekend supervisory shifts entirely. When not on duty, supervisors weekly rotate being "on call."

<sup>2</sup> Local distribution includes overseeing substations, which step down high voltage electricity received from incoming transmission lines, local distribution lines carrying the stepped-down electricity, transformers which further step-down the voltage for use by customers, and the lines to customers' premises.

<sup>3</sup> System distribution includes overseeing the high voltage power lines within the Employer's system which carry electricity from the Employer's power plants, or purchased from outside power plants, to the substations.

<sup>1</sup> The relevant contract, at the time the petition was filed, was effective from October 15, 1989, through October 15, 1992.

Planned switching for routine repair of equipment occurs once or twice a month. The switching sequences for such work may involve as many as 20–25 steps. Although the Employer's engineers design most of the planned switching, the distribution dispatchers generally design two to four switching occurrences a year. The field employees, either troublemen or servicemen, go to the problem spot to open and close switches manually in the planned sequence, reporting to the dispatchers by two-way radio as each step is completed. If a field employee finds some reason that the switching sequence is unsafe or discovers unforeseen problems, the field employee brings the matter to the distribution dispatcher's attention. The distribution dispatchers then may decide to abandon the switching sequence, redesign it, call for a repair crew, or postpone non-emergency work.

Distribution dispatchers use the center's mapboard, which displays the primary circuits and the substations for the Jackson district, in order to isolate problems, monitor switches, and plan switching sequences. Priority is given to the customers named in the Employer's "critical customers list," which sets several different priority levels for named customers.<sup>4</sup> Critical customers include hospitals, certain large companies, and residential customers whose treatment of health problems depends on the continuous operation of electrically run equipment.

In emergency outages, a distribution dispatcher uses the computerized SCADA system to locate the trouble, and attempts to operate the appropriate switches through that system. If this is unsuccessful, the dispatcher will call the on-duty troubleman to go to the site to investigate the problem. The dispatcher relays the information provided by the SCADA system to the troubleman to open and close certain switches manually in order to isolate (i.e., de-energize) the problem. At times the dispatchers may ignore an alarm from the SCADA system, such as when a breaker has opened but closes shortly after the alarm was given.

If the problem requires more work than the troubleman can handle, the troubleman and the distribution dispatcher decide what additional personnel are needed, and the distribution dispatcher is expected to seek additional help. Most of the time, the field employee (who is at the problem site), specifies the help he needs—such as a small or a large crew. The bargaining agreement provides that when an employee "working alone on a trouble call determines, after investigation, that help is needed to perform the work safely, he may request such needed help and Company shall make every effort to send the type of help requested." Once the need for additional help is determined, the distribution dispatcher will

request that an additional field employee or a construction crew be sent to the site of the trouble. In some circumstances, the dispatcher may decide to wait until the next day to repair the problem. A field supervisor, if on duty, is responsible for the actual call out; if not, the dispatcher will use call-out lists, with servicemen called out by assigned territory and troublemen by seniority. Specific call-out procedures are set forth in agreements between the Employer and the Unions. When a line crew is called out, it goes to the trouble area to repair the damaged equipment under the direction of a senior lineman. The distribution dispatcher is contacted only if additional switching is required.

If a distribution dispatcher has more work than he can handle, he may call in an additional distribution dispatcher. If the additional distribution dispatcher is needed within 2 hours of the beginning of the next shift, the distribution dispatcher for the upcoming shift is called to work early. Otherwise, the distribution dispatcher will call in a distribution dispatcher by seniority. If a distribution dispatcher is going to be less than 2 hours late, he will call the on-duty distribution dispatcher, who will work past the end of his shift until the scheduled distribution dispatcher arrives. If a storm causes damage near the end of a shift that would require additional help, management has instructed distribution dispatchers to stay after the end of their shifts.

In addition, distribution dispatchers have a limited role with respect to meter readers. Meter readers get most of their work assignments during the day from their supervisors. The Employer, however, places a high priority on reconnecting customers who have been disconnected for not paying their bills or who have been disconnected in error. After hours,<sup>5</sup> distribution dispatchers contact meter readers to tell them where to go to reconnect such customers. Several Employer memoranda govern the call-out procedures. If storms are approaching, the distribution dispatcher may decide to call out a serviceman instead of a meter reader.

### *C. System Dispatchers*

The system dispatchers are responsible for monitoring the transmission system throughout all or parts of 46 counties, including approximately 160 substations and switching points.<sup>6</sup> In addition to coordinating the transmission of electricity, they run carrier tests, monitor power frequency, respond to trouble situations, restore service to substations, and process requests for line clearances during equipment outages.

These dispatchers maintain 24-hour coverage, 7 days a week, on rotating shifts. They work in a room at the Rex Brown Power Plant in Jackson. Their immediate supervisor, Magee, works out of a facility about 4–5 miles

<sup>4</sup> The record is unclear on how the critical customer list is generated; however, a distribution dispatcher testified that he received information about critical customers from "marketing people."

<sup>5</sup> Meter readers are on duty until 8 p.m.

<sup>6</sup> As stated above, transmission lines, in contrast to the distribution system, run from power plants to step-down substations.

away from 8 a.m. to 5 p.m., and may be reached by phone or pager at any time. Magee visits the dispatchers' office two or three times a week, and the dispatchers advise him daily of what they are doing.

Planned switching (which constitutes 80 to 85 percent of the switching involving the system dispatchers) must be approved by the Employer's management and by the parent company's dispatchers,<sup>7</sup> who are located in Pine Bluff, Arkansas. The Pine Bluff dispatchers coordinate outages on transmission lines for all four of the parent company's subsidiaries. After the order for the planned outage is approved, the system dispatchers write out the switching sequence based on detailed system instructions provided by Magee's office, including 10 to 12 set procedures. They call a day ahead to the service supervisor, local manager, or clerk of the affected district to have field employees in place the next day. In overseeing the work as it is performed, the system dispatchers are in continuous communication with the field employees to direct the switching activity, to make certain that the switching sequences are completed step-by-step, and to handle unforeseen problems.

If the manager of operations/communications (Magee) or a field employee, requests that a line be taken out of service, the system dispatcher fills out a clearance form and has it approved by the Pine Bluff dispatchers. The system dispatcher gives the field employee a clearance number when a line is taken out of service. After the field employee completes the work, he must repeat the clearance number to the system dispatcher as a signal that the line is ready to be energized.

The SCADA system warns the system dispatchers of downed lines and other emergencies.<sup>8</sup> If the trouble is in the Jackson district, the system dispatchers call the Jackson district's dispatchers to request that field personnel be sent to the trouble spot. For all other districts, they contact the on-call supervisor to send out field employees. In responding to the emergency, distribution dispatchers are sometimes able to use the SCADA system to open or close the proper switches. If the trouble cannot be corrected in this manner, the system dispatchers will communicate switching steps to field employees at the trouble site.

## II. REGIONAL DIRECTOR'S FINDINGS

The Regional Director found that the distribution dispatchers' and system dispatchers' assignment of, and direction of, field employees does not entail the use of independent judgment and that the Employer's dispatchers are therefore distinguishable from the systems supervisors in *Big Rivers*. Accordingly, the Regional Director found that the Employer's dispatchers are not statutory supervisors and dismissed the Employer's petition to

clarify the bargaining unit to exclude the disputed dispatcher positions.

More particularly, the Regional Director found, in contrast to the dispatchers in *Big Rivers*, that managerial or professional employees rather than the distribution dispatchers design most of the planned switching sequences and that system dispatchers, in designing switching sequences, follow specific instructions or procedures. The Regional Director further found that the distribution dispatchers' and the system dispatchers' direction of field employees pursuant to such planned switching sequences is limited to the communication of information and does not support a finding that they exercise independent judgment. In addition, the fact that the system dispatchers first must notify headquarters' dispatchers in Pine Bluff before beginning planned switching, further demonstrates that they do not exercise independent judgment in directing field employees.

The Regional Director also found that the distribution dispatchers' and the system dispatchers' function during emergencies is to use their technical expertise to relay to field employees the information necessary to correct the problem, and that their calling out of troublemen, servicemen, and meter readers does not demonstrate the exercise of independent judgment.

## III. PARTIES' CONTENTIONS

### A. Employer-Petitioner

The Employer-Petitioner contends that the Regional Director too narrowly construed, improperly distinguished, and therefore departed from, the established precedent of *Big Rivers*. Although the Employer recognizes that there are details that differ between the duties of the dispatchers in that case and the duties of the distribution dispatchers and system dispatchers in this case, the Employer asserts that the cases cannot be materially distinguished. The Employer also contends that both the distribution dispatchers and the system dispatchers exercise supervisory independent judgment.

Further, the Employer contends that the distribution dispatchers exercise independent judgment in designing and implementing switching sequences; directing employees in the proper sequences; looking for faults that caused outages; setting priorities for work orders; determining the number of crews or troublemen to call in; calling in the crews and troublemen; directing and requiring overtime for meter readers; and deciding to assign themselves overtime.

Similarly, the Employer maintains that the system dispatchers exercise supervisory independent judgment in designing switching sequences, modifying them to meet contingencies, and deciding how to implement them; anticipating trouble before it arises; determining how to sectionalize transmission lines; issuing clearance orders; dispatching and directing switchmen in the execution of

<sup>7</sup> The Employer is a subsidiary of Entergy Corporation.

<sup>8</sup> The system dispatchers have the authority in some instances to ignore SCADA alarms.

switching sequences; and deciding to assign themselves overtime.

### B. Unions

The Unions, in contrast, contend that any assignments or directions the distribution dispatchers and the system dispatchers give are routine: and that, therefore, the Regional Director properly distinguished *Big Rivers*. More specifically, the Unions contend that the routine dispatch of service personnel is a clerical function, not supervisory assignment, and that any discretion the dispatchers might possess or exercise in outages or other emergencies is circumscribed by the collective-bargaining agreement and well-established Employer policies; that any assignment of overtime to themselves or to meter readers is the rote application of well-established policy; that switching directions are for the most part routine conveyances of prepared plans drawn by engineers or carried out through the SCADA system; and that those instances in which the dispatchers must devise or redesign switching sequences due to outages or other unforeseen problems are infrequent and, in any event, involve only the exercise of the dispatchers' specialized training and skills.

## IV. ANALYSIS

### A. History

Prior to *Big Rivers*, the Board found that workers who monitored the transmission and distribution of electric power, designed some or most of the switching sequences, and directed field employees in carrying out the switching orders were not statutory supervisors. The Board reasoned that these workers did not exercise independent judgment in directing field employees in carrying out the switching orders or in the incidental assignment of employees during outages and other emergencies.<sup>9</sup> The reviewing courts, however, regularly denied enforcement of the Board's decisions and found that these positions were supervisory.<sup>10</sup> One court stated that "the Board both oversimplified and underestimated the

responsibilities inherent in this position,"<sup>11</sup> while another stated that the Board "virtually ignored the scope of the system supervisors' authority in emergency situations," and quoted testimony that a system supervisor during an emergency "has to be knowledgeable enough to be able to sit down and make up a [switching] schedule on pretty short notice."<sup>12</sup>

In light of the courts' reversals, the Board reassessed its position, and in *Big Rivers*, decided that the employees in these positions generally possessed and exercised supervisory authority. Although such employees usually did not hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust the grievances of other employees, the Board decided in *Big Rivers* that they responsibly directed other employees and that their consequent assignment of employees to carry out the switching directives involved the use of independent judgment. Accordingly, the Board concluded that they were statutory supervisors.

Specifically, the Board found that the systems supervisors in *Big Rivers* "alone are responsible for the design of highly technical and complex switching orders," and "alone give the individual instructions directly to the employees for the execution of those orders." Id. 266 NLRB at 382. The Board further found that "they often have the sole and complete responsibility for ensuring safe and continuous service to the Employer's customers." Id. at 383. Accordingly, the Board clarified the existing unit to exclude the dispatchers as statutory supervisors. In so doing, the Board explicitly made *Big Rivers* controlling precedent and overruled prior inconsistent cases. Id. at 383 fn. 2.

### B. Issue

The sole issue in this case is whether the distribution dispatchers and system dispatchers should be excluded from the bargaining unit. The Employer-Petitioner contends that they should be excluded as statutory supervisors because they assign and responsibly direct field employees in carrying out complex switching orders. The Unions contend that the dispatchers are not supervisors and should remain in the unit.

Although there are factual differences between this case and *Big Rivers*, contrary to the Regional Director, we find that the differences are legally insignificant. Thus, were we to continue to follow *Big Rivers*, we would find that both classifications of dispatchers are supervisors and would clarify the existing bargaining unit to exclude the dispatcher classifications. We instead have decided to overrule *Big Rivers*.

In *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621 (1st Cir. 1994), cert. denied 514 U.S. 1015 (1995), the court of appeals suggested that the Board reexamine its views in this area, noting that:

<sup>11</sup> *Maine Yankee Atomic Power*, 624 F.2d at 359.

<sup>12</sup> *Southern Indiana Gas & Electric*, 657 F.2d at 884.

<sup>9</sup> These positions, variously referred to as dispatchers, dispatch supervisors, systems supervisors, etc., are common throughout electrical power companies, although their job titles differ. Although the degree to which such employees are involved in designing switching sequences and the extent to which they are closely monitored by their own supervisors differ from company to company, there is a commonality among them in that they are responsible for conveying the switching orders to field employees and are involved in calling out crews during power outages or other emergencies.

<sup>10</sup> In *Big Rivers*, 266 NLRB at 383 fn. 2, the Board referred to the following cases: *Arizona Public Service Co.*, 182 NLRB 505 (1970), enf. denied 453 F.2d 228 (9th Cir. 1971); *Detroit Edison Co.*, 216 NLRB 1022 (1975), enf. denied 537 F.2d 239 (6th Cir. 1976); *Maine Yankee Atomic Power Co.*, 239 NLRB 1216 (1979), enf. denied 624 F.2d 347 (1st Cir. 1980); *Southern Indiana Gas & Electric Co.*, 249 NLRB 252 (1980), enf. denied 657 F.2d 878 (7th Cir. 1981); *Monongahela Power Co.*, 252 NLRB 715 (1980), enf. denied 657 F.2d 608 (4th Cir. 1981).

[w]hen the Board and the courts set upon the task of defining a supervisor for the purposes of the statute, neither contemplated the type of quasi-professional, quasi-overseer employee encountered in this case and others in the public utilities setting.

Id. at 626.<sup>13</sup>

We accept the court's suggestion and, having reexamined this issue, shall, as indicated, overrule *Big Rivers* to the extent inconsistent with this decision.

### C. Legal Principles

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

<sup>13</sup> The pool coordinators in that case did not design or coordinate carrying out switching orders but were responsible for coordinating minute-by-minute load requirements within the New England Power Pool and the Pool's connections to other systems from New York State to Canada. In enforcing the Board's decision that the pool coordinators were not supervisors, the First Circuit further stated at 625:

The Coordinators in this case may direct COVE operators, but they are not responsible for what the satellite employees actually do. Further, in *Maine Yankee*, the Board ignored or depreciated evidence that the [alleged supervisors] used independent judgment in their direction of other employees. Here the Board implicitly recognized that the Coordinators are highly trained employees with substantial discretion, within the Operating Procedures, to instruct other employees. The Board, however, refused to take the further step of concluding that [the] PCs and SPCs were responsible for [the] other employees' actions, and in that, we conclude, it was correct.

The court's discussion suggests that the issue is one of responsibility or accountability for subordinates' actions: "Finally, and most importantly, [the alleged supervisors] are simply not held accountable if a PC disobeys a direct order, misquotes a price or causes a blackout." Ibid. The court, however, failed to make clear to what extent it viewed "responsibility" as a different test from the exercise of "independent judgment" in directing employees.

Although the pool coordinators in *Northeast Utilities* and the dispatchers in this case perform different functions, the court's invitation to revisit the area extends to other cases in the public utilities industry including the dispatchers in the present case. The court's decision in *Northeast Utilities* distinguished its decision in *Maine Yankee Atomic Power*, supra, which used a *Big Rivers*-type analysis in finding that shift operating "supervisors" overseeing a nuclear power plant's control room were statutory supervisors. *Maine Yankee* was one of the cases the Board considered as contrary to the Board's earlier decisions and as supporting its decision in *Big Rivers*. See also *Monongahela Power Co.*, 657 F.2d at 608 (involving control room foremen overseeing a conventional power plant's control room), which was similarly cited by the Board in *Big Rivers*.

Section 2(11) is to be read in the disjunctive, and "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The Board is cautious in finding supervisory status because supervisors are excluded from the protections of Section 7 of the Act: "[T]he Board has a duty . . . not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect." *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), enf. 171 NLRB 1239 (1968), cert. denied 400 U.S. 831 (1970). The burden of proving supervisory status is on the party alleging that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 28 (1993), and cases cited therein.

Applying the indicia of assignment and responsible direction—the only Section 2(11) indicia alleged in this case—often is a difficult task as the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and the act of supervision. *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993).

Consequently, the Board examines the facts of each case to decide whether an alleged supervisor possesses and exercises supervisory authority within the meaning of Section 2(11) of the Act. In some cases, however, there is a degree of commonality among similar positions within a particular industry permitting general guidelines to be formulated. Such is the case here. The dispatchers at issue in this case possess similar authority over field employees as that exercised by the systems supervisors in *Big Rivers* and related cases.

We are well aware that there are factual differences between this case and *Big Rivers*. In *Big Rivers*, the systems supervisors alone were responsible for the design of switching orders, and in this case the dispatchers use and rely on more powerful and sophisticated computer systems. We find, however, that these differences are not grounds for legally distinguishing *Big Rivers* from this case.

In inviting the Board to revisit this area, the court in *Northeast Utilities Service*, 35 F.3d at 621, stated that in cases raising this issue neither the Board nor the courts fully contemplated, or analyzed, the type of quasi-professional, quasi-overseer employee encountered. We agree. We believe that the Board in *Big Rivers*, and the courts in the cases leading to the Board's decision, may have been swayed by the complexity of the dispatchers' responsibilities and the adverse consequences to the well-being, safety, and lives of the public and employees that might result from systems supervisors' (dispatchers herein) faulty decisions regarding switching sequences.

That severe consequences might flow from the dispatchers' misjudgments in their own work, however, does not necessarily make their judgments supervisory. See *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999) ("[d]irecting others in work that may be complex and potentially dangerous is not enough to elevate an employee to supervisory status.")

The Board and the courts have implicitly and explicitly relied on the principle that the exercise of even critical judgment by employees based on their experience, expertise, know-how, or formal training and education does not, without more, constitute the exercise of supervisory judgment. In *Providence Hospital*, 320 NLRB 717, 725 (1996), *enfd. sub nom. Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), the Board found that registered charge nurses were not supervisors although they "at times must make immediate life-or-death decisions involving acutely ill patients, and in so doing, may instruct others, including other nurses, about what needs to be done. . . . Nevertheless, when a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give." *Id.* at 728. In reaching this determination, the Board applied its traditional test of distinguishing supervisors who share management's power from skilled non-supervisory employees whose direction reflects their superior training, experience, or skill. *Id.* at 729. Contrary to our colleagues' suggestion, we are not now extending a new test to nonprofessional employees. For example, in *Ten Broeck Commons*, 320 NLRB 806, 811 fn. 10 (1996), a case involving licensed practical nurses, who are technical employees, the Board held: "Designing a plan of medical care is not . . . an exercise of supervisory judgment within the meaning of Sec. 2(11) but is an exercise of the expert judgment of the nurses vis-à-vis their position as technical or professional employees."

The Board's approach to the supervisory issue in charge nurse cases has been explicitly upheld by the Seventh, Eighth, Ninth, and District of Columbia Circuits, and implicitly upheld by the Eleventh Circuit.<sup>14</sup> The court in enforcing the Board's underlying decision in *Providence* agreed with the Board's basic rationale in *Providence* and *Ten Broeck Commons*. Thus, the court stated:

To the extent a charge nurse gives routine guidance to other RNs, she does so more in the capacity of a leadman or straw boss than anything else. By exercising

her professional judgment in this routine manner while working alongside and guiding less experienced employees, the charge nurse is not transformed into a supervisor.

*Providence Alaska Medical Center*, 121 F.3d at 554.<sup>15</sup> Similarly, in *NLRB v. Audubon Health Care Center*, *supra*, the court in an en banc decision held:

The most important point that the Center overlooks in emphasizing the supervisory responsibilities of the charge nurses . . . is that nurses are professionals and their exercise of supervision is guided by professional training and norms. The charge nurses in this case are registered nurses, who are highly trained and responsible. Supervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives.

*Id.* at 666. Similarly, in this case, the dispatchers are highly trained and responsible, and no issue of divided loyalties is raised.

Charge nurses' responsibilities obviously differ from dispatchers' responsibilities. Among other differences, dispatchers do not work side-by-side with field employees. Nonetheless, the legal principles are related to the issues in this case. A professional, technical, expert, or experienced employee is often required, as part of the employee's own job, to make detailed and complex decisions. The judgment required in making those decisions does not, however, "transform" that employee into a supervisor. And, the mere communication of that information to other employees does not mean that the alleged supervisor uses supervisory judgment in assigning and directing others, especially when such assignments and direction flow from professional or technical training and do not independently affect the terms and conditions of employment of anyone.

The Board and the courts have applied the basic principle of the charge nurse cases discussed above to other industries. In *McCullough Engineering Co.*, *supra*, the Board, in finding that lead operators were not supervisors, held that it was not control over machinery, but control over personnel that was decisive in determining supervisory status. Indeed, the court in *Northeast Utilities*, 35 F.3d at 625, drew this distinction: "[The alleged

<sup>14</sup> See *NLRB v. Audubon Health Care Center*, 170 F.3d 662 (7th Cir. 1999) (*en banc*); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), *enfg.* 323 NLRB No. 200 (1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), *enfg.* 322 NLRB No. 54 (1996) (not reported in Board volumes); *Providence Alaska Medical Center*, *supra*; *Cooper/T. Smith, Inc.*, *supra*, *enfg.* 325 NLRB No. 28 (1997).

<sup>15</sup> Cf. *Grancare, Inc. v. NLRB*, 137 F.3d 372, 386 (6th Cir. 1998), in which the court denied enforcement of a similar Board decision finding that charge nurses were not statutory supervisors. But see Judge Moore's concurrence which stated:

The end result in this circuit is that virtually all nurses working in nursing homes are deemed by this court to be supervisors, a result that seems to me contrary to the intent of Congress, the law of other circuits, and the decisions of the Board.

supervisors] are unquestionably highly trained employees who use independent judgment to make and implement complex technical decisions that affect the entire region's power supply. They do not, however, 'responsibly . . . direct' other employees within the meaning of the statute." This distinction was recognized by the Seventh Circuit in *Westinghouse Electric Corp.*, 424 F.2d 1151, 1156, in which the court noted that field engineers, whom it found not to be supervisors, "are markedly different from foremen in the commonly recognized sense. They surely give directions as well as advice, but such communications are necessary incidents of the application of their technical know-how." Applying a similar analysis, the 11th Circuit in *Cooper/T.Smith, Inc. v. NLRB*, supra, found that docking pilots were not supervisors because the expertise they used to guide tugboats was not "exercised with a management prerogative, but rather as an experienced employee." 177 F.3d at 1267. The basis for our decision in this case rests on just such distinctions.

Since 1947, when Congress enacted Section 2(11) to exclude supervisors from the definition of "employee," and especially since 1983, when the Board decided *Big Rivers*, industrial workplaces have undergone accelerating change due to increasing technological innovation. Rank-and-file employees today are often expected to operate complex, often computer-controlled, equipment requiring advanced knowledge, technical expertise, and the exercise of judgment which, if not properly applied or made, could have serious consequences to the companies' equipment, production, and financial well-being, and in some situations to employees' or the public's safety and lives. To quote the First Circuit in *Northeast Utilities*, 35 F.3d at 626, the work force increasingly requires "quasi-professional" employees who must use independent judgment in their own work.

Accompanying the accelerating technological change occurring in the workplace, and an increasingly skilled and sophisticated work force, are growing competitive pressures which have led some employers to seek to achieve competitive advantage by using or experimenting with strategies to attain higher efficiencies and higher levels of productivity and quality. For some this has entailed changes, or in some cases transformation, in the way work is designed, organized, and managed and in the way organizations are structured. Hierarchical, autocratic systems, where the thinking and control aspect of work is separate from the doing of work, are in some workplaces giving way to flattened management systems and the elimination of levels of middle management. Greater autonomy, responsibility, and accountability are being afforded to workers at all levels of the organization, with an expectation that rank-and-file employees will not only perform work but will also be responsible for improving work methods and procedures, solving problems on the job, making decisions about production

and quality, and coordinating their work with that of others. We believe that many employers are placing increased reliance on self-control and self-management and the use of autonomous or self-regulated teams. To quote again the First Circuit in *Northeast Utilities*, 35 F.3d at 626, the workplace increasingly requires "quasi-overseer" employees who must use independent judgment in their own work.

We believe that the Board and the courts must recognize these work force and workplace changes that are making the quasi-professional or quasi-overseer employee more common in the workplace. The prevailing conditions of employment in 1947, when Congress enacted Section 2(11), must be given due weight in determining whether an employee is a supervisor, but we would be remiss if we failed to take into account changing technologies, methods of production, and managing work. As an administrative agency, our task is, within the statutory framework, to keep abreast of changing conditions in the workplace and to determine how such changes affect traditional analysis.<sup>16</sup> "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

## V. APPLICATION

### A. Introduction

There is no contention or evidence that either the distribution dispatchers or the system dispatchers have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances of employees or effectively to recommend such action. The Employer contends, however, that the dispatchers assign and responsibly direct employees. The evidence shows that the distribution dispatchers and the system dispatchers direct field employees in what switching sequences to follow. The evidence also shows that both classifications of dispatchers assign field employees in emergencies. The evidence, however, fails to show that the dispatchers' assignment and direction require the use of supervisory "independent judgment." Both the Board and courts have recognized that not every act of assignment or direction makes an employee a supervisor. As with every Section 2(11) indicium, assignment and direction must be carried out with independent judgment in order to establish supervisory status.

Also, as discussed above, the Board is cautious in finding supervisory status because supervisors are excluded from the protections of the Act. Recently, the Court of Appeals for the District of Columbia Circuit, in discussing under what circumstances unexercised "paper author-

<sup>16</sup> The Board has recognized the need to make such adjustments in the past. See e.g., *Anamag*, 284 NLRB 621 (1987), which dealt with the then-new concept of team leaders and its potential for widely variant utilization in the workplace.

ity” may show supervisory status, aptly described why supervisory findings must not be lightly made:

Supervisory status determinations carry important consequences for workers whose status is in question. . . . Thus when a worker is found to be a “supervisor” within the meaning of the Act, she is excluded from the NLRB’s collective bargaining protections. In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights. Because of the serious consequences of an erroneous determination of supervisory status, particular caution is warranted before concluding that a worker is a supervisor despite the fact that that the purported supervisory status has not been exercised.

*East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

#### *B. Assignment*

The distribution dispatchers’ role in assigning field employees includes calling in additional troublemen or line crews for major problems;<sup>17</sup> dispatching crews to trouble spots; setting priorities on the order of work; and holding meter readers and themselves overtime. The record evidence, as discussed below, shows that distribution dispatchers have a circumscribed role in assignment that does not require the use of significant, if any, independent judgment.

Field crews are regularly scheduled to work during the day; nearly all their assignments are made by a field supervisor. On Saturdays, when a supervisor is not present, the dispatcher will assign the crew to the source of a problem. In contrast, troublemen (at least one is always on duty) generally receive their assignments from the dispatcher. When a dispatcher receives a report of a customer’s problem, the dispatcher sends an on-duty troubleman to the problem area.<sup>18</sup> Once in the area, the troubleman reports the extent of the problem to the dispatcher and requests whatever additional help the troubleman believes is needed. According to the testimony of District Manager Wooten, although the “final decision” on whether to call in additional field employees may “rest on the dispatcher,” the decision “would be a joint effort between [the dispatcher and] the person in the field that had troubleshot the case.”<sup>19</sup> Consistent with

that testimony, the weight of the evidence shows that the decision of whether to call out employees and how many to call out is a collaborative decision between the troubleman and the dispatcher and is generally, if not always, based on the troubleman’s assessment of the problem and the number of employees requested by the troubleman.<sup>20</sup> Indeed, the bargaining agreement effectively requires the distribution dispatchers to seek additional help when requested. Thus, we find that, as set forth above, the distribution dispatchers’ role in calling out additional employees does not require the use of supervisory independent judgment.

Although calling off-duty employees to work entails the payment of overtime, because the dispatchers have only a limited role in deciding when to call out employees, the dispatchers’ role in selecting employees for overtime is similarly limited. In addition, the determination of whom to call out is governed by well-established procedures. During the regular hours of a field crew’s work, the field employees’ supervisor decides which employees to call. During off hours, there is a designated on-call crew. The call out is usually performed by the on-call supervisor. Only when the dispatcher cannot reach the on-call supervisor or the on-call crew, will the dispatcher need to personally select the crew to be called. In these circumstances, the dispatcher operates pursuant to the established protocol of calling out employees to equalize overtime based on a predetermined list. The established practice is followed whether the call out is made by the day supervisor, the on-call supervisor, or the dispatcher.

Meter readers’ assignments are made by their immediate supervisors. If the meter readers cannot complete the reconnections during their regular hours, the distribution dispatchers can hold them overtime to complete assignments. The distribution dispatchers authorize such overtime only when they are aware of reconnections to which the Employer gives a high priority. There is no evidence that they can compel overtime.

In addition, distribution dispatchers who have too much to handle, e.g., after storms causing multiple outages, can hold themselves over for the next shift, call in other distribution dispatchers, or call in distribution dispatchers from the next shift. As the Employer has well-established policies and guidelines for such assignments, the dispatchers do not exercise independent judgment in selecting employees for overtime.

crew, based on what he and the troubleman feel like the needs in the field are.”

<sup>20</sup> In addition to Wooten’s admission that the decisions are a joint effort between the dispatchers and the troublemen, distribution dispatcher Blankeny testified that, if a troubleman reports that additional employees are needed (whether an additional troubleman or a large or small field crew), “I always try to do it as near like he told me as I can.” And when asked on cross-examination whether he ever had a situation in which he did not send exactly what the troubleman asked for, Blankeny answered, “If it was changed in the way of crew make-up, I don’t recall that I have ever had anything to do with it.”

<sup>17</sup> Although there are some differences in how assignments are made to troublemen and servicemen, District Manager Wooten testified that, in deciding whether to dispatch additional employees, there is “no need to distinguish so much between the troubleman and the serviceman” as “they are interchangeable.”

<sup>18</sup> Customer calls are not made to the dispatcher, but are sent to the dispatcher via computer printout.

<sup>19</sup> Wooten further testified that the dispatcher “wouldn’t call the crew directly; he would call the on-call person in the appropriate district and say, I need you to get me a large crew or a —whatever—small



Distribution dispatchers have a limited role in setting priorities for work. If, for example, a problem can be corrected temporarily by coiling a line on the top of a pole, the dispatcher may postpone further correction of the problem until a regularly scheduled crew can complete the repair. During multiple outages, distribution dispatchers may give the line crews priorities regarding which customers to restore first. Giving priority to certain customers, however, is done pursuant to the Employer's critical customers list which is conveyed to the dispatcher with the repair request. When a crew reports that a repair has been completed, the dispatcher may need to send them to another outage based on the critical customers list, to the next customer by the order of when the outage problem was reported to the dispatcher, or on a geographic basis, i.e., a dispatcher will send a crew to the nearest problem rather than across town. We find that the distribution dispatchers' role in assigning priorities is governed by preexisting rules, and what judgments they do make are based on commonsense considerations not unique to supervisors.<sup>21</sup>

The role played by the distribution dispatchers in assigning work "within parameters carefully drawn" entails following established protocol and not the exercise of supervisory independent judgment. Typically, the Board has found that dispatchers in other industries are not supervisors. See, e.g., *B.P. Oil*, 256 NLRB 1107 (1981) (dispatchers of mechanics and drivers of heating oil trucks); *Interstate Motor Freight System*, 227 NLRB 1167 (1977) (dispatchers of truck drivers); and *New England Transportation Co.*, 90 NLRB 539 (1950) (dispatchers of bus drivers). The courts have agreed. In *Meenan Oil Co. v. NLRB*, 139 F.3d 311 (2d. Cir. 1998) (dispatchers of fuel oil truck drivers and service employees), the court stated, "Their tasks are routine and clerical in nature, and they are governed by parameters set by the Company." Accord, *NLRB v. Sherwood Trucking Co.*, 775 F.2d 744, 749 (6th. Cir. 1985) (routine dispatch of employees "within parameters carefully drawn" is not statutory supervision).<sup>22</sup>

The system dispatchers are even more circumscribed than the distribution dispatchers in their authority to assign employees. Their role in calling in additional employees is to relay the requests to either the Jackson District's dispatchers or to the on-call supervisors.

Accordingly, we find that neither the distribution dispatchers nor the system dispatchers exercise statutory supervisory authority in their assignment of employees.

### C. Responsible Direction

As detailed in section I, the Employer's distribution dispatchers and system dispatchers differ little in their job responsibilities arguably relating to the work of field employees, and we shall discuss them together. These responsibilities are two-fold, i.e., their selection or design of switching orders, and their communication with field employees.

As discussed above, switching orders are designed to isolate and de-energize the section of the power grid that field employees will be working on, and to minimize the disruption of electricity to other sections—whether for planned or emergency power outages. All of the Employer's dispatchers are highly experienced employees who use their technical know-how and expertise to monitor electrical transmission systems, plan preventive maintenance, and isolate and correct problems as they arise—either from their work stations, using the SCADA computer system<sup>23</sup> or through a collaborative effort with field employees at the site of the trouble or work to be done.<sup>24</sup>

Although the Employer's engineers design most of the switching sequences, on occasion, the distribution dispatchers and the system dispatchers design switching orders themselves. Whether they use a prepared switching order, modify a switching order, or design one of their own, the dispatchers must exercise discretion and judgment in deciding what switching sequences to use. Such judgment, however, relates to their own responsibilities, is based on their experience and technical expertise, and does not evidence any control over personnel.

As discussed previously, the exercise of judgment pursuant to an employee's professional, technical, or experienced special knowledge or expertise does not translate into supervisory status. Clearly, the distribution dispatchers and system dispatchers exercise substantial and significant independent judgment in applying their own technical training, experience, and expertise to the portion of their jobs which involves the selection or design of the proper switching sequences for planned or emergency outages. This, however, does not constitute the exercise of Section 2(11) supervisory independent judgment. The performance of their own job entails the exercise of special knowledge or expertise, and that is why they are among the Employer's highest paid employees.

<sup>21</sup> See *Cooper/T.Smith v. NLRB*, supra (docking pilots' assignment of tugboats based on schedule provided by employer is not the exercise of independent judgment).

<sup>22</sup> On occasion, the Board has found trucking industry dispatchers to be supervisors based on the presence of indicia of supervisory authority other than assignment or direction or work. See, e.g., *Quality Transport, Inc.*, 211 NLRB 198, 201–202 (1974) (finding supervisory status on the basis of authority of dispatchers to penalize drivers, affecting their incomes and right to the next day's runs). No such authority is present here.

<sup>23</sup> Both the distribution dispatchers and the system dispatchers may at times ignore SCADA system alarms. Contrary to the Employer's contentions, this has no bearing on whether they are supervisors.

<sup>24</sup> According to serviceman Rankin and distribution dispatcher Blankeney, because the control room mapboard does not cover outlying districts (away from Jackson), field employees in those districts must perform their own switching without communicating with dispatchers because the dispatchers have no way of telling how the switching is set up.

But that is quite different from the exercise of independent judgment in overseeing the work of others. See *Cooper/T.Smith, Inc. v. NLRB*, supra.

The second part of the distribution dispatchers' and system dispatchers' responsibilities is their interaction with field employees which is limited to communicating or relaying the switching orders or sequences, making certain that the actual switching has been done, and ascertaining from the field employees where and what the trouble is during power outages, emergencies, or times when a planned switching sequence cannot be carried out. This "back-and-forth" communication is done via two-way radio. There is no evidence that the dispatchers go to field employees' jobsites, train them, or tell them how to engage or disengage switches, evaluate their work, or otherwise interact with them.

Once a switching order is ready to be implemented, the dispatchers and the field employees again have a "back-and-forth" discussion in which the dispatchers tell the field employees which switching sequences to follow and the field employees tell the dispatchers that the step has been completed. In a sense, this communication involves "directing" the field employees in the performance of their work. In reality, however, the communication of previously planned or newly designed switching orders simply involves relaying the switching sequence, step-by-step, to the field employees. In context, this relay of information is an almost routine or clerical dispatching function and does not entail the exercise of supervisory independent judgment.

During a power outage or when a problem is discovered in a switching order, field employees relay the nature of the problem to the dispatchers so that they may learn what the problem is and intelligently fulfill their own job responsibilities of selecting, modifying, or designing the proper switching sequences. Such communication involves the relatively straightforward act of receiving information relayed by field employees and not the exercise of supervisory independent judgment. Indeed, in this situation, it is the field employees who, from their onsite assessment of the problems, may be said to "direct" the dispatchers in order to enable them to determine the proper switching sequences to deal with outages or to redesign existing ones to correct the problems.

We find that the dispatchers' direction of the field employees in the execution of switching orders does not involve the use of independent judgment vis-à-vis the field employees' work. As we have stated previously, mere communication of complex schemata does not compel a finding of supervisory independent judgment.<sup>25</sup> What judgment is necessary to the dispatchers' jobs already has been undertaken by management, profession-

als, or the dispatchers themselves in designing the proper switching sequences. The mere communication of these technical decisions does not constitute statutory supervision. "[T]ransmission of work assignment orders to the servicemen does not constitute 'responsible direction' within the meaning of the Act." *Boston Gas Co.*, 136 NLRB 219, 223 (1962). The Board and the courts have applied this general principle to various relationships, including those involving charge nurses,<sup>26</sup> journeymen construction workers,<sup>27</sup> engineers,<sup>28</sup> and tugboat docking pilots.<sup>29</sup> Unlike those cases, the dispatchers at issue here do not work next to or in close proximity with the field employees. Thus, their communication of switching sequences to field employees is not even the face-to-face relationship present in the cases referred to above where the Board nonetheless found no supervisory status.<sup>30</sup>

In summary, the judgment exercised by the dispatchers in selecting or designing switching sequences is a function of the dispatchers' own work, based on their training, knowledge, and experience and does not constitute the exercise of independent supervisory judgment. We find that this interaction fails to show the exercise of supervisory authority. Similarly, the dispatchers' back-and-forth communication with field employees regarding the implementation of switching sequences does not entail the exercise of statutory independent judgment, but rather the almost routine or clerical relay of complex schemata.

Our dissenting colleagues' analysis, as well as the courts' analyses in the cases they cite, fails to appreciate the distinction between judgment necessarily used by employees in performing their own jobs and judgment involved in supervising employees. Thus, it blurs the difference between the exercise of considerable judgment by the dispatchers in designing, adapting, and modifying switching sequences—which are the dispatchers' own tasks as employees—and the more circumscribed judgment entailed in the act of communicating or relaying the sequences to field employees. They, therefore, reach an incorrect and, we believe, untenable result. In each case our dissenting colleagues cite, the court relied in part on

<sup>26</sup> *Ten Broeck*, supra, and *Providence Hospital*, supra, both discussed above.

<sup>27</sup> *Adco Electric*, 307 NLRB 1113, 1122–1126 (1992), enf'd. 6 F.3d 1110, 1117–1118 (5th Cir. 1993) (journeyman electrician's directing work of apprentice on the basis of superior knowledge insufficient to establish supervisory status).

<sup>28</sup> *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1384 (9th Cir. 1976) (engineer's direction of a small team in such a manner as in his judgment would achieve successful completion of a project did not make him a supervisor).

<sup>29</sup> *Cooper/T.Smith, Inc. v. NLRB*, supra (docking pilots' use of expertise to direct tugboats during docking and undocking process not exercise of supervisory authority).

<sup>30</sup> To that extent, the dispatchers are more like architects in charge of projects who provide "professional direction and coordination" to other employees. See, e.g., *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971).

<sup>25</sup> Thus, as the Board previously has noted: "[E]very order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car." *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1957).

the technical expertise of the dispatchers (or equivalent positions) in finding them to be supervisors, rather than focusing on their interactions with field employees.<sup>31</sup> Similarly, they also rely on the Board's finding in *Big Rivers*, that the switching supervisors' design and adjustment of sophisticated switching sequences showed supervisory independent judgment;<sup>32</sup> and, in this case, they equate the distribution and system dispatchers' performance of their own technical duties with supervisory status.<sup>33</sup> Again, like the courts they cite, our dissenting colleagues fail to explain how an employee's responsibility to make consequential, even life threatening decisions based on the employee's expert or technical judgment logically equates with supervisory judgment or makes an employee a supervisor under the criteria set forth in Section 2(11). As recognized by the 11th Circuit in *Cooper/T.Smith, Inc. v. NLRB*, supra, this is the critical flaw in this line of reasoning.

Contrary to the dissent, and for the reasons stated above, we find that that the dispatchers' purported authority to assign and direct field employees does not involve the exercise of independent judgment within the meaning of Section 2(11). Accordingly, we conclude

<sup>31</sup> See, e.g., *Arizona Public Service Co.*, 453 F.2d at 232 (where the court noted, in particular, that the system load supervisors and assistant supervisors had the "authority to decide without consulting anyone whether or not a line can be de-energized"); *Monongahela Power Co.*, 657 F.2d at 613 (where the court found that "[i]t is the [control room foreman's] expertise and judgment on which other employees, including his superiors rely"); and *Maine Yankee Atomic Power*, 624 F.2d at 361 (where the court stated that "the possibility of operator error is not merely theoretical . . . such error could cause damage to the plant. . . . We are at a loss to see how such grave responsibility can be swept aside as routine and clerical"). See also *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997), in which the court in finding boat captains supervisors stated:

Although, unlike the situation in *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980), we are not concerned here with a possible atomic disaster, the effects that the mishandling of over four million gallons of gasoline might have upon the waterways and the surrounding areas would also be a disaster. Like the *Maine Yankee* court, we are at a loss to understand how the grave responsibility for preventing such a catastrophe can be swept aside by the Board as routine and clerical. It was the duty of Spentonbush's captains, as masters, to supervise their crews so that no such disaster would occur.

Likewise, our dissenting colleagues emphasize that individuals who monitor power transmission "direct complicated switching functions," (*Southern Indiana Gas & Electric Co.*, supra); "ensure the smooth operation of complex, delicate machinery," (*Maine Yankee Atomic Power Co.*, supra); and that "dispatchers must decide among several alternative courses of action, and their selections involve independent judgment and responsible direction," (*Detroit Edison Co.*, supra).

<sup>32</sup> Thus, the dissent cites the Board's reliance on the fact that *Big Rivers*' switching supervisors "designed highly technical and complex switching orders" and "were empowered to take whatever action that was necessary to ensure uninterrupted power generation and transmission."

<sup>33</sup> In particular, the dissent notes that the dispatchers exercise judgment by "their design of two to four scheduled switching operations per year;" "their authority during switching operations . . . to abandon or redesign the switching work," and their "abandoning, modifying, or redesigning switching sequences."

that the distribution dispatchers and the system dispatchers are not supervisors within the meaning of Section 2(11) of the Act.

## VI. CONCLUSION

For the foregoing reasons, we find that the distribution dispatchers and the system dispatchers are not supervisors and should continue to be included in the collective-bargaining unit. Accordingly, we shall clarify the bargaining unit to find that they properly are included.<sup>34</sup>

## ORDER

The National Labor Relations Board clarifies the collective-bargaining unit represented by the International Brotherhood of Electrical Workers, Locals 605 and 985, specifically to provide that the classifications of distribution dispatcher and system dispatcher properly are included.

MEMBERS HURTGEN AND BRAME, dissenting.

## Overview

For nearly half a century, Federal courts of appeals have overwhelmingly found that individuals who monitor the transmission and distribution of power for utility companies are supervisors within the meaning of Section 2(11) of the Act.<sup>1</sup> The courts' rationale for finding these individuals to be supervisors is that they responsibly direct employees, through the use of independent judgment.

For years the Board maintained a contrary position, despite consistent court disapproval.<sup>2</sup> In *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), the Board acceded to the weight and reasoning of judicial precedent and determined that "system supervisors" were statutory supervisors. In *Big Rivers*, the Board concluded, among other things, that system supervisors satisfied Section 2(11)

<sup>34</sup> Dismissals of clarification petitions should be limited to cases in which such petitions are untimely, do not involve unit clarification issues, or are otherwise procedurally inappropriate. The Employer's petition here raises timely and appropriate unit clarification issues as to whether the disputed classifications should be excluded. In these circumstances, we believe that it is both proper and legally correct to clarify the unit to include the disputed positions rather than simply to dismiss the petition.

<sup>1</sup> *Southern Indiana Gas & Electric Co. v. NLRB*, 657 F.2d 878 (7th Cir. 1981), denying enf. of 249 NLRB 252 (1980); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 228 (9th Cir. 1980), denying enf. of 239 NLRB 1216 (1979); *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981), denying enf. of 252 NLRB 715 (1980); *NLRB v. Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976), denying enf. of 216 NLRB 1022 (1975); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971), denying enf. of 182 NLRB 505 (1970). See also *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), denying enf. of 80 NLRB 1334 (1948). But see *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704 (5th Cir. 1979), enf. 238 NLRB 1669 (1978).

<sup>2</sup> See the Board cases cited in fn. 1, above. See also *Baltimore Gas & Electric Co.*, 138 NLRB 270 (1962); *Connecticut Light & Power Co.*, 121 NLRB 768 (1958); *Puget Sound Power & Light Co.*, 117 NLRB 1825 (1957); and *Texas Electric Service Co.*, 77 NLRB 1258 (1948). The Board maintained the same position in a number of decisions predating the 1947 Taft-Hartley amendments.

criteria because they responsibly directed employees in the execution of complex switching orders during emergency and routine maintenance operations, and they assigned employees to carry out these orders. Both the direction and the assignment involved the use of independent judgment. Since *Big Rivers*, the Board, in a series of orders (not included in bound volumes), has consistently adhered to its position that dispatchers are statutory supervisors.<sup>3</sup>

Our colleagues concede that, under *Big Rivers* and its progeny, as well as the preponderance of circuit court law, the instant systems dispatchers and distribution dispatchers are statutory supervisors on the basis that they responsibly direct and assign work. However, rather than adhere to *Big Rivers* and established precedent, the majority now abruptly changes course, overrules settled, reasoned law, and concludes that the dispatchers are not supervisors. We find that this reversal is unwarranted and that the majority's rationale is legally unsupported.<sup>4</sup> Accordingly, we dissent.

#### The Statute

Under Section 2(11), supervisory status exists if an individual possesses:

authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that the definition of Section 2(11) is to be read in the disjunctive, and that the presence of any of the listed criteria establishes supervisory status. See, e.g., *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986); and *NLRB v. Fullerton Publications*, 283 F.2d 545, 548 (9th Cir. 1960). Thus, "any individual who has

the authority to use independent judgment in the execution or recommendation of any of the functions listed . . . is a supervisor." *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). It is equally well established that supervisory status turns on the existence of any enumerated power and not on the frequency of its exercise. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949).

When Congress enacted Section 2(11), it added the phrase "responsibly to direct" to the enumeration of supervisory powers. Congress did so because, in the words of Senator Flanders:

[U]nder some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instruction for its proper performance.

Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees . . ." Their essential managerial duties are best defined by the words, "direct responsibly. . . ."

[Congressional Record, Senate, May 7, 1947.]

#### Judicial Application of Section 2(11)

When applying Section 2(11), the courts routinely have found that individuals who monitor the transmission and distribution of power ("dispatchers") are supervisors under the "responsible direction" criterion. For example, in *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971), the Ninth Circuit rejected the Board's finding that system load supervisors (SLDs) were not supervisors but merely skilled employees authorized to give routine directions. In finding the SLDs to be supervisors, the court particularly noted that, on weekends and nights, higher supervision was absent and that, during frequent emergency situations, SLDs had broad "authority to decide without consulting anyone whether or not a line can be de-energized, the final authority to determine the feasibility of repairs and the ability to call linemen out for overtime." *Id.* at 232. In the court's view, the SLDs were "more than simple supervisors of machines. They effectively direct field operations during emergencies and after hours." *Id.* The court further determined that the SLDs' directions to subordinates in these circumstances far exceeded the "necessary incidents of the application of their technical know-how,"<sup>5</sup> and, instead, constituted responsible direction. In finding

<sup>3</sup> But see *New England Power Pool*, Case 1-RC-19907, where the First Circuit adopted the Board's finding that the disputed pool coordinators were not supervisors. *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621 (1st Cir. 1994). In *New England Power Pool*, however, the Board distinguished *Big Rivers* on the basis that the disputed pool coordinators did not responsibly direct field employees because the utility was divided into several layers, utilizing employees of several different companies.

<sup>4</sup> The Board frequently has been criticized for its inconsistent and uneven application of the statutory definition of supervisor. Note, "The NLRB and Supervisory Status: An Explanation of Inconsistent Results," 94 Harv. L. Rev. 1713, 1718 (1981). Here, the Board and court law is settled, well-reasoned, and predictable. Given the criticism, it is particularly inappropriate to change course. Indeed, the courts have held that the Board is obligated to maintain a consistent approach to its unit determinations. *Fiber Glass Systems v. NLRB*, 807 F.2d 461, 464 (5th Cir. 1973). Further, where the Board seeks to depart from extant precedent, it must provide a well-reasoned explanation for its reversal. *NLRB v. WKRG-TV*, 470 F.2d 1302, 1311 (5th Cir. 1973). In our view, the majority has not satisfied this burden.

<sup>5</sup> *Id.* at 233, quoting *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1156 (7th Cir. 1970).

the SLDs to be statutory supervisors, the court concluded that it was immaterial that some of the directions they gave to field personnel were routed through others, or that their directions were couched in non-demanding terms. See also *Southern Indiana Gas & Electric Co. v. NLRB*, 657 F.2d 878 (7th Cir. 1981); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 362 (1st Cir. 1980). The determinative fact was that the SLDs used independent judgment responsibly to direct other employees.

When finding that individuals who monitor power transmission are statutory supervisors, courts of appeals have emphasized that these individuals direct complicated switching functions—particularly in emergency situations—and that this constitutes “responsible direction,” requiring the use of “independent judgment,” within the meaning of Section 2(11). *Southern Indiana Gas & Electric Co. v. NLRB*, 657 F.2d at 884. Thus, in *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d at 362, the First Circuit rejected the argument that shift operating supervisors (SOS) did “little more than supervise the use of sophisticated machines” (quoting *Arizona Public Service Co. v. NLRB*, 453 F.2d at 231). The court found that the SOS were Section 2(11) supervisors because they necessarily exercised significant independent judgment when directing system take-outs and start-ups “that clearly require carefully coordinated, precise and skilled action by several operators” to ensure the smooth operation of complex, delicate machinery. 624 F.2d at 357. Thus, the court rejected the Board’s arguments that SOS directions were merely “routine and repetitive.” 624 F.2d at 361.<sup>6</sup>

Similarly, in *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981), the Fourth Circuit found control room foremen (CRFs) to be supervisors. Their use of technologically complex equipment, when monitoring and distributing electrical power, did not detract from the necessity to use human expertise and judgment:

It is [the CRF’s] expertise and judgment on which other employees, including his superiors rely. . . .

....

Given the responsibility placed on him, he must be a skilled employee. However, we do not find from the record before us that he is merely an automaton who does little than “supervise the use of sophisticated machines.” [citation omitted]. He is a supervisor with responsibility for himself and others. . . .

Id. at 613, 614–615. [Citation omitted.]<sup>7</sup>

<sup>6</sup> The First Circuit also faulted the Board for failing to consider the seriousness of the consequences that flowed from switching errors. 624 F.2d at 357.

<sup>7</sup> In *Monongahela*, the court expressly rejected the Board’s characterization of the SOSs’ duties as being of a routine and repetitive nature, involving little use of independent judgment.

When finding that dispatchers are supervisors, courts have rejected the argument that supervisory status cannot be found where employers maintain detailed guidelines for devising switching operations. *NLRB v. Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976). This is because guidelines, even if detailed, cannot cover every possible situation. As recognized by the Fourth Circuit in *Southern Indiana Gas & Electric Co. v. NLRB*, supra, “Each switching situation is unique and each switching schedule will vary.” Dispatchers are not prevented from departing from written instructions if another course of action is more advantageous. Rather, they are “explicitly admonished to take any necessary measures to protect the system in emergencies anytime [higher level] supervisors are unavailable or time pressures forbid consultation.” 657 F.2d at 889.<sup>8</sup> See also *Monongahela Power Co.*, supra.<sup>9</sup>

Likewise, courts have rejected arguments that dispatchers are not supervisors because the switching operations they monitor and direct were automated and contain numerous safety backups. Id. As stated by the First Circuit in *Maine Yankee Atomic Power Co. v. NLRB*, notwithstanding such system mechanization, “the possibility of operator error is not merely theoretical . . . Such error could cause damage to the plant. . . . We are at a loss to see how such grave responsibility can be swept aside as routine and clerical.” 624 F.2d at 361. Indeed, the courts have recognized that many situations arise—emergency and nonemergency alike—where the dispatchers must decide among several alternative courses of action, and their selections involve independent judgment and responsible direction. *NLRB v. Detroit Edison Co.*, 537 F.2d at 244.<sup>10</sup>

<sup>8</sup> In finding power dispatchers to be supervisors, the courts have distinguished those cases in which individuals monitoring power distribution were expressly precluded from acting independently in emergency situations. *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704, 706 (5th Cir. 1979); *Oil Workers v. NLRB*, 445 F.2d 237, 242 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

<sup>9</sup> Similarly, in *Maine Yankee*, supra at 362, the court rejected the Board’s argument that because most switching operations were closely governed by Federal regulations or the company’s written procedures, the SOSs’ activities were routine. The court found that written operating procedures did not exist for every possible contingency. Even if guidelines covering virtually every situation could exist, the court concluded that this would not demonstrate that independent judgment was not exercised, particularly given the immense number of available options and procedures.

<sup>10</sup> As the Sixth Circuit noted in *Detroit Edison*, “They have the discretion and responsibility, in fact, to weigh these various alternatives, determine the best course of action, initiate the orders to the various operating personnel in the field to carry out these orders, and then finally to see that the orders are, in fact, duly discharged and carried out.” 537 F.2d at 244.

And as expressed by the First Circuit in *Maine Yankee*:

We fail to see how selecting the correct operating procedures, whether written or not, governing such a vast array of instruments and equipment in all possible permutations of emergency and more routine situations, directing the other employees in the performance of the procedures so selected, and coordinating all their

An additional factor relied on by the courts when concluding that dispatchers are statutory supervisors, is the frequency with which they work without higher supervision.<sup>11</sup> Thus, whereas dispatchers work round-the-clock shifts, higher management frequently works only weekday, daytime shifts. Although designated managers may be on-call during their nonwork hours, the courts have recognized that:

There is no guarantee that a superior will be available for consultation after hours, or in every emergency, even assuming that the time factors would permit such contact. Especially in light of this, if these employees are not supervisors, then the Company's entire electrical system operates without any supervision in the evenings, on weekends, and in emergencies.

*Southern Indiana Gas & Electric v. NLRB*, 657 F.2d at 886. See also *Arizona Public Service Co. v. NLRB*, 453 F.2d at 231-232 fn. 7.<sup>12</sup> Accordingly, the courts have found that dispatchers are supervisors where they have authority to take independent action, when necessary, when directing employees on switching operations. *Southern Indiana Gas & Electric v. NLRB*, a 657 F.2d at 886, 888. See also *NLRB v. McCullough Environmental Services*, 5 F.3d 923. (5th Cir. 1993).

Courts similarly have found that supervisory status is present even if dispatchers are required to advise higher management of their actions, when time permits. *Southern Indiana Gas & Electric v. NLRB*, 657 F.2d at 885. "The Company's expectation that supervisors will advise one of their superiors of decisions taken independently does not eliminate their authority to take independent action when necessary." *Id.* See also *Maine Yankee*, 624 F.2d at 358; and *NLRB v. Detroit Edison Co.*, 537 F.2d at 244.

In sum, the courts, with virtual unanimity,<sup>13</sup> consistently have found that individuals responsible for moni-

toring power transmission and distribution are supervisors on the basis that they responsibly direct other employees, using independent judgment.

### *Big Rivers*

Applying extant court law, the Board in *Big Rivers* found that "system supervisors" were Section 2(11) supervisors on the basis that they responsibly directed field employees in the execution of complex switching orders. 266 NLRB at 383 fn. 2. In reaching this conclusion, the Board relied, among other things, on the fact that the system supervisors: (1) worked rotating, around the clock shifts, while upper management worked only weekday, daytime shifts; (2) designed highly technical and complex switching orders for use in routine scheduled maintenance operations and in emergency situations;<sup>14</sup> and (3) coordinated power generation and purchase in emergency situations. In *Big Rivers*, the Board found that it was particularly significant that, in emergency situations, system supervisors were empowered to take whatever action that was necessary to ensure uninterrupted power generation and transmission. These actions included, among other things, developing complex switching orders, assigning field personnel to undertake those orders (without prior approval of field supervision if exigencies prevented it), and directing field personnel through step-by-step instructions, ensuring that the orders were properly executed.

### Instant Case

Although there may be a few factual distinctions between the instant case and *Big Rivers*, the majority concedes that they are legally insignificant. Thus, the record establishes, and the majority concedes, that under extant Board and court law the distribution dispatchers and systems dispatchers are statutory supervisors. With regard to the distribution dispatchers, their responsible direction of work, and consequent assignment of employees to carry out this work, is shown by factors which include: (1) their design of two to four scheduled switching operations per year; (2) their authority during scheduled switching operations—and, indeed, at any time when unforeseen trouble arises—to abandon or redesign the switching sequence, call in a repair crew, or postpone the work;<sup>15</sup> (3) their direction of field employees in switching sequences; (4) their direction of field employees in emergency situations to take the particular steps necessary to restore power;<sup>16</sup> and (5) calling in or holding over

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efforts in a unified scheme of operation, can be said not to depend on an exercise of independent judgment. That judgment is hopefully informed by strict training and written procedures, but it is judgment nonetheless; it is not simply the conditioned reflex of an automaton. 624 F.2d at 363.

<sup>11</sup> Although the lack of higher supervision, standing alone, is insufficient to establish supervisory status, it is indicative of such status. *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 941 fn. 28 (5th Cir. 1993); and *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982).

<sup>12</sup> In *Arizona Public Service Co.*, the Ninth Circuit reviewed the transcript of a weekend, evening shift (when higher supervision was not present), and concluded that the SLDs' "authority responsibly to direct other employees was not 'weak or jejune but import[s] active vigor and potential vitality'" (quoting *NLRB v. Security Guard Service*, 384 F.2d 143, 147 (5th Cir. 1967)).

<sup>13</sup> As noted above, there is one exception to this judicial precedent. In *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621 (1st Cir. 1994), the First Circuit enforced the Board's determination that pool coordinators (PCs) were not statutory supervisors. As discussed above in fn. 3, however, the Board found that case factually distinguishable from extant Board and court precedent primarily because the field

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personnel with whom they communicated switching orders were employees of a different employing entity.

<sup>14</sup> The Board noted that there was no manual to guide the system supervisors in developing their switching orders.

<sup>15</sup> Significantly, emergency switching occurs much more frequently than planned switching.

<sup>16</sup> If unforeseen trouble occurs during scheduled or emergency switching, distributions dispatchers (as well as system dispatchers) are not required to obtain prior approval before authorizing these actions. Indeed, as testified to by District Manager Wooten, troubleshooters are "at

additional distribution dispatchers, without supervisory approval.<sup>17</sup> In addition, the distribution dispatchers are responsible for meter readers who reconnect customer power. During evening hours, when higher management is absent, the distribution dispatchers instruct meter readers where to go and unilaterally decide whether to call in additional meter readers because of anticipated trouble.

The record establishes that systems dispatchers responsibly direct work, and consequently assign employees to perform it.<sup>18</sup> As with the distribution dispatchers, systems dispatchers provide round-the-clock coverage, as compared with the weekday, daytime hours of higher management.<sup>19</sup> System dispatchers direct field employees during scheduled or emergency switching sequences to “make certain that the switching sequences are completed step-by-step, and to handle unforeseen problems.” The systems dispatchers, like their distribution dispatcher counterparts, decide what action to take when switching sequences cannot be followed, such as by prioritizing work requests, ignoring SCADA<sup>20</sup> alarms, abandoning, modifying, or redesigning switching sequences,<sup>21</sup> and by

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the dispatchers’ disposal during their entire shift to go to and do, based on the decision that the dispatcher has made as far as prioritizing a job assignment or troubleshooting a particular case of trouble that may have to come in.”

<sup>17</sup> Indeed, the Regional Director found that distribution dispatchers are responsible for monitoring the status of the distribution system, restoring power to customers after outages, directing field employees to repair faults in the system and to carry out planned and emergency switching operations.

<sup>18</sup> During regular switching operations, it is the dispatcher who decides how many field servicemen are needed. As testified to by Wooten, “[t]he on-duty construction superintendent or supervisor has absolutely no authority to override what the dispatcher says he needs.” Indeed, construction supervisors do no work on Saturdays, during which the line crew is “there at the disposal of the dispatcher.”

<sup>19</sup> System dispatchers’ supervisors work out of another facility, 4 to 5 miles away and visit the dispatchers’ jobsite 2 to 3 times weekly.

The fact that higher management may be on call at night and on weekends does not alter the fact that dispatchers can take whatever action necessary to protect the power system and can order and direct action in emergency situations without notifying supervisors or receiving prior approval.

<sup>20</sup> “SCADA” is the Employer’s computerized switching system.

<sup>21</sup> As recognized by the courts, the dispatchers’ authority responsibly to direct is not diminished by the fact that guidelines exist for preparing switching sequences. It is uncontroverted that the guidelines do not cover every situation and that dispatchers are authorized to deviate from these guidelines, as needed, in scheduled as well as emergency switching operations. Thus, many situations arise—both during emergency and routine switching operations—where decisions have to be made among various alternatives. As stated by District Manager Wooten, “[T]here is no pre-set switching instruction already developed for all emergencies. There is just no way that you could do that. It is a spontaneous type reaction as far as emergency switching.” The dispatchers responsibly weigh those alternatives, determine the best course of action, initiate orders to field personnel and see that the orders are duly carried out. Further, during emergency switching sequences, where there are no prepared switching orders, field personnel are wholly dependent on the dispatchers to guide them safely through complex switching procedures and release them when the task is completed. As recognized by the Fourth Circuit in *Monongahela Power Co. v. NLRB*, 657 F.2d at 614, in “coordinat[ing] the activities of sev-

deciding whether it is necessary to call out an entire crew, or by extending their hours beyond their scheduled shift if trouble arises.<sup>22</sup> The fact that the dispatchers may convey these directions through field supervisors does not diminish their responsible direction. Neither does the fact that some scheduled switching orders are designed by others undermine the fact that the systems and distribution dispatchers exercise independent judgment in implementing these orders and that, in some cases, the dispatchers design the orders. Thus, regardless of the origin of the orders, once undertaken, the dispatchers responsibly direct the field personnel step-by-step in their execution, and have sole responsibility for ensuring safe and uninterrupted service, including at times when no other supervisors are present. In these circumstances, it cannot be said that the dispatchers are mere conduits for disseminating information or that their assignments and directions reflect limited discretion. On the contrary, they are quintessential examples of individuals who use independent judgment to responsibly assign and direct employees within the meaning of Section 2(11).

Notwithstanding their concession that the instant dispatchers would be supervisors under *Big Rivers* and extant court law, the majority seizes on an “invitation” from the First Circuit in *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 612 (1994), cert. denied 514 U.S. 1015 (1995), to reexamine the issue of dispatcher supervisory status in the utility industry. In doing so, our colleagues now conclude that dispatchers, long held to be supervisors, are in reality mere “quasi-professionals, quasi-overseers” who give only routine directions and assignments. We disagree. In our view, the long-settled factual bases and legal rationale for finding dispatchers to be supervisors are as valid today as they were when the courts first pronounced them nearly one-half century ago. In addition, we find the majority’s reliance on *Northeast Utilities* somewhat anomalous, given that the court’s “invitation” is largely premised on its view of the word “responsibly” (relating to direction). Significantly, that is an issue that our colleagues do not reach.<sup>23</sup> Further,

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eral other employees to ensure the smooth operation of delicate machinery, [the dispatchers] necessarily exercise[] a significant degree of independent judgment,” and responsibly direct field employees.

<sup>22</sup> Contrary to the majority, we find that the dispatchers have significant authority to authorize overtime. As testified to by Wooten and Manager of Operations William Magee, the dispatchers determine whether: a serviceman or troubleman should be called out on overtime; a meter reader’s shift should be extended or one (or more) should be called out on overtime; and whether the dispatcher should extend his/her shift or call in additional dispatchers.

<sup>23</sup> Member Hurtgen respectfully disagrees with the First Circuit’s view, expressed in *Northeast Utilities*, that “responsibly to direct” means direct accountability for the performance of another person, in the sense of being called to account if the performance is flawed. The Supreme Court acknowledged in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), that “responsibly to direct” is an ambiguous term. However, Member Hurtgen finds the better interpretation is that the individual is charged with a particular function. If a person is charged with a particular function, he/she is “responsible” for seeing

the term “responsibly” does not modify “assign,” an independent basis for finding supervisory status. Finally, as noted above, *Northeast Utilities* presents unique facts under which both the Board and court agreed that supervisory status was not established under *Big Rivers* and extant law.

To the extent that the majority argues that technological advances warrant a reversal of *Big Rivers* and a rejection of extant court law, we disagree. In our view, our colleagues’ use of catch-phrases like “accelerating technological change,” “growing competitive pressures,” and “autonomous or self-regulated [work] teams,” obfuscates the relevant inquiry: whether, irrespective of available technology or guidelines, the dispatchers in directing and assigning employees are charged with taking whatever steps are necessary—including bypassing even the most automated technology—in order to protect the system. Although technology may have become more advanced, it has not reached the point where all human judgment is rendered unnecessary. The reviewing courts frequently have recognized this point. See *Monongahela Power Co. v. NLRB*, 657 F.2d at 614–615 (“not . . . merely an automaton who does little than ‘supervise the use of sophisticated machines.’”) See also *Southern Indiana Gas & Electric Co. v. NLRB*, supra; *Maine Yankee Atomic Power Co. v. NLRB*, supra; *Arizona Public Service Co. v. NLRB*, supra; and *NLRB v. Detroit Edison Co.*, supra. Furthermore, despite their extensive discussion of work strategies that are emerging in response to what they characterize as “accelerating technological change,” none are at issue in this case. Nor does the record establish that such changes pervade in this industry or in this facility. In the absence of such evidence, we find little support for our colleagues’ reliance on “technology” as a basis for jettisoning well-settled law.<sup>24</sup>

Our colleagues also argue that “some employers are placing increased reliance on self-control and self-management and the use of autonomous or self-regulated

teams.” We agree, and we further agree that the Board should not unreasonably discourage this trend. However, we do not think that this trend has very much to do with the instant case. This case concerns dispatchers who issue assignments and directives for others to carry out. It does not involve individuals who make their own decisions or groups of individuals who collectively make decisions.

Our colleagues next assert that, in finding supervisory status, the Board, in *Big Rivers*, and the courts were improperly influenced by: (1) the severity of “the adverse consequences . . . that might result” from faulty assignments and directions; and (2) “the complexity of the dispatchers’ responsibilities.” We disagree. Although the courts have recognized the consequences of mistakes in judgments, their basic point has been that judgment is necessary. In this sense, the severity of the potential consequences is an element in determining whether an individual uses independent judgment. Concededly, there may be cases where an individual must take a rigidly prescribed course of action (e.g., throw a lever) and, if he/she fails to do that, a terrible consequence will occur. We would agree that such an individual, acting without discretion, is not a supervisor. However, as discussed above, the dispatchers here use their discretion in deciding what to do, including directing the work of employees of the Employer to take particular actions, in a myriad of situations. The scope and severity of the consequences are related to the actions that they choose to take (or not take). Thus, like the courts, we would not ignore the consequences of their actions or inaction. More particularly, the record amply demonstrates that the consequences of the dispatchers’ directions and consequent assignments are great. They include such possibilities as fires, safety hazards, damage to expensive equipment, endangering field personnel and the loss of power to such critical customers as hospitals and government communication buildings. As testified to by Service Superintendent May, “The consequences could be disastrous.”

Accordingly, where, as here, the dispatchers must use such independent judgment to make complex decisions when assigning and directing work—electing among a myriad of complex factors (including, by not limited to, the availability and capabilities of complex equipment, field employee skill and availability, weather and environmental factors, and the varying power needs of the affected customers)—they clearly are exercising supervisory authority.<sup>25</sup>

that the function is carried out. It is not necessary to show that the person will suffer consequences if something goes wrong. There is nothing in the legislative history (see Senator Flanders’ remarks, supra) which makes that showing a necessary element of supervisory status.

In agreement with Member Hurtgen, Member Brame finds that the term “responsibly to direct” does not require a showing that the disputed individual will be held accountable for the actions of the person directed. In Member Brame’s view, the First Circuit’s possible implication to the contrary turned on that court’s recognition that the employees at issue in that case were not supervisors because the employees they supposedly supervised worked for another employer. Member Brame, however, finds it unnecessary to delimit in this case the precise boundaries of the statutory term “responsibly to direct” as it is undisputed that the distribution and system dispatchers here “responsibly direct” employees as that term is defined in *Big Rivers*, supra.

<sup>24</sup> The majority’s reliance on purported recent changes in technology and work force organization practices is ironic in the circumstances of this case, as they use these supposed developments to justify a return to a legal position which the Board, under pressure from the courts, abandoned 16 years ago, prior to the advent of the developments cited by the majority.

<sup>25</sup> The majority cites *Providence Hospital*, 320 NLRB 717, 715 (1996), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), for the proposition that the seriousness of potential consequences of the dispatchers’ directions does not establish supervisory status. As discussed above, we find it is a relevant factor. We also note that other courts have rejected the principle that our colleagues espouse. See *NLRB v. Attleboro Associates*, 176 F.3d 154 (3d



Our colleagues seek to expand the rationale in *Providence Hospital*, 320 NLRB 717 (1996), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997) to bolster their conclusion that dispatchers are not supervisors, but merely “quasi-professional” technical employees. In *Providence*, a Board majority held that registered charge nurses were not supervisors because their directions were the result of professional or technical know-how, and not the exercise of independent judgment.<sup>26</sup> In the instant case, the majority extends that rationale to nonprofessional employees. We would not do so.<sup>27</sup> As an initial point, we note that several courts have expressly rejected the Board’s *Providence Hospital* supervisory analysis. See *NLRB v. Attleboro Associates*, supra; *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998); *Beverly Enterprises, Virginia v. NLRB*, 165 F.3d 290 (4th Cir. 1999); *Glenmark Associates, Inc. v. NLRB*, supra; *Grancare, Inc. v. NLRB*, supra; and *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997). In so doing, the Fourth Circuit firmly rebuked the Board in *Glenmark*, stating that:

This issue of the supervisory status of nurses serves as another example of the Board’s continuing effort to modify the plain language of 2(11). . . . We are not the first court to wonder whether this new interpretation [of 2(11) in, inter alia, *Providence Hospital*] is an end run around an unfavorable Supreme Court decision in order to promote policies of broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of

unfair labor practice findings [the Board] makes . . . the Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the [courts].

147 F.3d at 340 fn. 8. Commentators similarly have criticized the Board’s *Providence Hospital* decision, noting that the Board therein created another false dichotomy [following the Supreme Court’s rejection of the Board’s “patient care analysis”] by “[choosing] to draw a distinction between the ‘expert judgment’ exercised by professionals, and the ‘independent judgment’ used by supervisors.” G. Roger King, “Where Have All the Supervisors Gone?—The Board’s Misdiagnosis of *Health Care & Retirement Corp.*,” 13 Lab. Law. 343, 353 (1997); see also Note, “The NLRB and Supervisory Status: An Explanation of Inconsistent Results,” 94 Harv. L. Rev. at 1713–1714, 1721.<sup>28</sup>

In sum, the Board majority failed in its effort to show that apparent supervisory powers are really professional attributes. In any event, the majority rationale in *Providence Hospital*, which is based on the perceived need to distinguish between “professional” and “supervisory” independent judgment, cannot logically be applied to the non-professional persons involved herein.

Although the persons involved here are not professionals, this is not to say that their functions are clerical or routine. In this regard, we disagree with the majority’s characterization of the dispatchers’ directions to field personnel as an “almost routine or clerical dispatching function.” Rather, we find that the record fully demonstrates that the dispatchers assign field employees to specific switching tasks and direct them in the operation of those activities. Further, in executing this responsibility, the dispatchers undertake such activities as assigning and relocating field personnel, calling in or extending the shifts of those personnel, and directing their work in the switching operations. In our view, this responsibility far exceeds incidental direction of less skilled employees and constitutes supervisory authority responsibly to direct.

In any event, the real inquiry is not professional vs. nonprofessional, but whether these persons exercise independent judgment. That the dispatchers may call on their own skill, experience, and training in directing and assigning complex switching operations does not make those decisions any less than independent. To the contrary, this factor emphasizes the individual human judgment that is involved. *Providence Hospital v. NLRB*, 121 F.3d at 556 (dissenting opinion). See also *Caremore, Inc. v. NLRB*, 129 F.3d 365, 370 (6th Cir. 1997).<sup>29</sup>

Cir. 1999), quoting *NLRB v. Glenmark Associates*, 147 F.3d 333, 342 (4th Cir. 1997) (“[D]ecisions to assign work are ‘inseparable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an impact on health and well-being.’”). See *Beverly Enterprises, Virginia v. NLRB*, 165 F.3d 290, 298 (4th Cir. 1999). See also *Maine Yankee Atomic Power Co. v. NLRB*, supra; and *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 491 (2d Cir. 1997) (“Like the *Maine Yankee* court, we are at a loss to understand how the grave responsibility for preventing such a catastrophe can be swept aside by the Board as routine and clerical”).

Member Brame does not pass on the Board’s decision in *Providence Hospital*, supra. He notes, however, that several courts of appeals have rejected the Board’s *Providence Hospital* supervisory analysis. See text accompanying fn. 27. Member Brame agrees with the Fourth Circuit that the Board should refrain from attempts to modify the plain language of the statute and should respect the decisions of reviewing courts and he fears that this case may be viewed by the courts as another example of the conduct that troubled the Fourth Circuit in *Glenmark*.

<sup>26</sup> Member Cohen dissented, finding, among other things, that the majority had ignored the substantial degree of independent judgment that charge nurses exercised in the assignment and direction of employees. Member Hurtgen agrees with that dissent.

<sup>27</sup> Our colleagues say that their rationale was previously extended to nonprofessionals in *Ten Broeck Commons*, 320 NLRB 806 (1996). Assuming that this is so, Member Hurtgen finds it irrelevant to the dissenting opinion. He believes that *Ten Broeck* itself was wrongly decided. In his view, the LPNs there were supervisors because, among other things, they responsibly directed employees.

<sup>28</sup> Many courts have expressed an unwillingness to defer to the Board’s interpretation of Sec. 2(11), finding that the Agency’s “manipulation of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings.” *NLRB v. Attleboro*, supra; *Spentonbush/Red Star Cos. v. NLRB*, supra at 492; *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992). We fear that the

Our colleagues concede that the dispatchers use independent judgment in designing and modifying switching sequences.

However, they assert that the judgment is “more circumscribed” with respect to communicating these sequences to employees. We disagree. The independent judgment of the dispatcher becomes the very basis for the directions and assignments to employees. Phrased differently, the independent judgment of the dispatchers has a direct impact on the work to be performed by the employees.

In support of its decision, the majority additionally relies on the fact that it has applied its expanded *Providence Hospital* analysis in other contexts. Specifically, our colleagues rely on *McCullough Engineering Services*, 306 NLRB 565 (1992), where the Board found that lead operators at a water processing plant were not supervisors. Indeed, the majority cites *McCullough* for the proposition that it is not control over machinery, but over personnel, that is decisive in determining supervisory status. We find the majority’s reliance on *McCullough* misplaced.

First, the Board in *McCullough* expressly distinguished the lead operators from system supervisors in *Big Rivers* and its progeny. As to the latter, the Board noted, in *McCullough*, that they were supervisors because they had “responsibilities to direct employees in response to non-routine events, responsibilities that went beyond supervising the use of sophisticated equipment.” *Id.* at 566. The same is true here.

Second, the Board’s *McCullough* decision did not withstand judicial scrutiny in the Fifth Circuit. That

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majority’s decision, which abrogates one-half century of settled court law, will further fuel judicial wrath and “increasingly . . . call[] into question [judicial] obedience to the Board’s decisions in this area.” *Spentonbush/Red Star Cos. V. NLRB*, 106 F3d at 492.

<sup>29</sup> See also Senator Flanders’ comment, *supra*, that supervisors exercise “personal judgment based on personal experience, training, and ability.”

court found that the lead operators were supervisors because they had the authority responsibly to direct other employees in a manner that was not merely routine or clerical, but which required the use of independent judgment.

Our colleagues rely heavily on *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999), to support their position that the instant dispatchers are not statutory supervisors. That case is inapposite. First, in the instant case, the dispatchers frequently design switching plans on the spot in response to unscheduled, emergency situations—and direct and assign field personnel in the execution of those plans. Conversely, in *Cooper/T. Smith*, the court makes clear that the work assigned by tugboat docking pilots (those alleged to be supervisors) “is based on a schedule given to, rather than set by, [the docking pilots.]” Second, unlike the dispatchers who deal directly with the field personnel they direct—either during shifts when field supervisors are unavailable, or as needed to handle emergency situations—the docking pilots in *Cooper/T. Smith* communicated only with the tugboat captain who “then determine[d] how his field crew will follow the instructions.” Finally, in *Cooper/T. Smith* the court repeatedly relied on its analysis in *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704 (5th Cir. 1979), to support its decision. We find *Exxon* inapplicable to the instant case because there the individuals monitoring power distribution were expressly prevented from acting independently in emergency situations—directly contrary to the dispatchers here.

Based on all of the foregoing, we find that the majority has not presented a compelling case for overruling *Big Rivers* or rejecting the weight of court law holding dispatchers to be Section 2(11) supervisors. Accordingly, we would grant the Employer’s unit clarification petition and exclude the distribution and systems dispatchers from the bargaining unit.